BRIEF IN SUPPORT OF PETITION.

In support of the allowance of the petition, the following is respectfully submitted:

ARGUMENT AND AUTHORITIES.

I.

THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR, AS IT RELATES TO THE STANDARD OF CARE IN SEAMEN'S ACTIONS UNDER THE JONES ACT, WAS IN CONFLICT WITH DECISIONS OF THIS HONORABLE COURT AND WITH DECISIONS OF THE CIRCUIT COURTS FOR THE SECOND, THIRD AND FOURTH CIRCUITS AND WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN SUCH ACTIONS, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

(a) *The decision of the Circuit Court of Appeals for the First Circuit, in approving the trial court's charge of merely general definitions of law and its refusal and failure to instruct the jury on the high degree of care owed to seamen in actions under the Jones Act, was clear error and prejudicial to the petitioners.*

The error that the petitioners rely on in this connection, relates to the course of reasoning and decision adopted by the Circuit Court of Appeals in approving the action of the trial court in refusing and failing to instruct the jury on the high degree of care owed to seamen and, in connection therewith, to define negligence within the purview of the Jones Act. The duty of the trial judge to properly instruct the jury was clearly set forth in the case of *Buckley* v. *Frankel* (1928), 262 Mass. 13, in which the court said:

> Page 15: "Of course it is the duty of the judge presiding over a jury trial to give full, fair, correct and clear instructions as to the principles of law governing all the essential issues presented, so that the jury may understand their duty and be enabled to perform it intelligently."

Although the trial court instructed the jury that the captain of the vessel in question was bound by what the ordinary careful and prudent and reasonable captain would have done, under the circumstances, yet the petitioners submit that this instruction was inadequate, because the trial court failed to sufficiently instruct the jury on this subject, so that they could intelligently determine what a reasonably careful and prudent captain would, or would not have done, under the circumstances. To instruct the jury, for example, that the defendant was under a duty to provide a seaworthy vessel, with a reasonably safe place to work and reasonably safe tools and appliances, without further instructing the jury so that they could intelligently understand and determine what is a seaworthy vessel, a safe place or safe tools and appliances, is wholly inadequate and requires the jury to base their conclusions of the law upon surmise and conjecture. This might be best illustrated by the necessity of literally thousands of decisions that have been rendered under the Jones Act, defining "seaworthiness," "safe tools and appliances," "safe place to work," etc. Likewise, to instruct the jury to find for the plaintiff, if they found the defendant negligent, without adequately instructing the jury how to determine negligence under the applicable law, would also lead to the same result.

While the petitioners agree that the actions of a reasonably, prudent and careful captain is the standard under the Jones Act, yet they specifically requested that the trial

court further instruct the jury so that the jury could determine what a reasonably prudent and careful captain would, or would not have done, under the circumstances. (Plaintiffs' Requests For Instructions—#8, 10, Rec. pp. 18. 38.) The necessity for the further instructions requested is obvious from the fact that opinion evidence regarding the actions of a reasonably careful and prudent captain in the case at bar, was apparently inadmissible under the circumstances and was not offered by either party. The jury were then left to rely entirely upon the adequacy of the instructions of the trial court, to intelligently understand and pass upon that issue.

Furthermore, in this same connection, the jury was instructed that it was for them to decide what duty was owed by the respondent to the petitioners' intestates, (Rec. p. 13) and the petitioners submit that this was clear error, for it is the function of the trial court to instruct the jury on the duty owed and, in this respect, the jury is strictly limited to finding whether there was a violation of that duty.

(b) *The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Fourth Circuits, substantiate the proposition advanced by the petitioners that a higher degree of care is to be exercised by the master for the protection of his crew, than is required of shore employers and under the common law.*

The case of *Cortes* v. *Baltimore Insular Line* (1932), 287 U.S. 367, was an action under the Jones Act for failure to furnish care and cure to a seaman ill with pneumonia and this Honorable Court, through Mr. Justice Cardozo, said:

> Page 376: "We are warned, however, that in giving this context to the statute (that there was a duty to furnish care and cure) we are omitting to give heed to

its reference to the act regulating the remedies of railroad employees, and are ignoring the *standards of duty* thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees 'for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier', or by reason of any negligent defect in its roadbed or equipment. (statute cited) True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. We say except in special circumstances, for it would be hazardous to assert that such a duty may not rest upon the representative of a railroad as well as upon the master of a ship when the servant, exposed by the conditions of the work to extraordinary risks, is helpless altogether unless relief is given on the spot. (cases cited) The result, however, will not be different though we assume that the servant of a railroad company, if he has been injured without fault, may never call for help as due to him of right, however pressing the emergency and (377) imperative the need. *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water.* The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly'. (case cited) Another court has said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and

limited.' (case cited) *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure of the crew of the train to come to the rescue of their comrade. *Harris* v. *Penn. R. R. Co.*, 50 F. (2d) 866, 868. There is little doubt that rescue is a duty when a sailor falls into the sea, *United States* v. *Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris* v. *Penn. R. R. Co., supra.* . . . (378) Congress meant no more than this, that the duty must be legal, *i.e.*, imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." (Italics ours.)

Other references by this Honorable Court to the high degree of responsibility owed to seamen are to be found in the following cases:

Socony-Vacuum Oil Co., Inc. v. *Smith,* (1939) 305 U.S. 424, 430, 431.

The Arizona v. *Anelich* (1936), 298 U.S. 110.

Calmar S.S. Corp. v. *Taylor,* 303 U.S. 525.

Chelentis v. *Luchenbach S.S. Co.*, 247 U.S. 372, 380, 381.

Jamison v. *Encarnation*, 281 U.S. 635, 639.
Alpha S.S. Corp. v. *Cain*, 281 U.S. 642.
Warner v. *Goltra*, 293 U.S. 155, 157.

The case of *Harris* v. *Penn. R. Co.* (1931 C.C.A. 4th), 50 F. (2d) 866, has been cited extensively in describing the unusual relation that exists between a seaman and his ship at sea. In that case, the court in holding the ship liable under the Jones Act for failing to exercise due diligence in attempting to rescue a member of the crew who had fallen into the sea through his own negligence, said:

> Page 868: "The contract of employment involves not merely a surrender of the personal liberty of the seaman to a greater extent than is customary, *Robertson* v. *Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715, but it imposes upon the employer an exceptional obligation to care for the well being of the crew. . . . There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. He binds himself by the contract of employment to serve the ship during the voyage, and desertion may be made an offense punishable by imprisonment. He owes obedience while on shipboard to his superior officers, and is bound to execute their lawful commands even at the risk of danger to his person or his life; and their right to enforce obedience by proper discipline and punishment has been recognized. If he is taken sick or is injured on board the ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. *By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general*

rules of common law to those employed in service upon land. From time immemorial, seamen have been called the "wards of admiralty"; and in this country as elsewhere the Legislature has enacted an elaborate system of legislation for their protection. Regardless of legislation, it is uniformly recognized that it is the duty of a vessel to care for a seaman who is taken sick or receives an injury on a voyage in the service of the ship, to the extent of providing medical care and attendance, and, if possible, a cure at the expense of the ship. And it is even required, where a serious accident occurs, that the master shall exercise a reasonable judgment as to putting into the nearest available port, in order that proper treatment may be secured. (Cases cited). Equally clear is the obligation upon the part of the ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency and to deny it in the greater. In both cases, it is implied in the contract (869) that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right." (Italics ours.)

In the case of *Armit* v. *Loveland* (1940 C.C.A. 3d), 115 F. (2d) 308, the court after reviewing the hazardous calling of the seaman and his dependence upon those in charge of his ship, said:

> Page 311: "The same peculiar circumstances attending the employment alike require that the rules of the common law respecting proof of the employer's negligence be not visited too rigorously upon seamen.

> Stated conversely, a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore."

Likewise, in the case of *Storgard* v. *France and Canada S.S. Corp.* (C.C.A. 2d), 263 F. 545, (cert. den. 252 U.S. 585), in which the court said:

> Page 548: "Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants."

(c) *The authorities cited by the Circuit Court of Appeals, in the case at bar, fail to support and justify the conclusions set forth therein.*

In discussing the test and standard to be adopted in determining whether the care exercised was proper and whether the master was negligent, (Rec. p. 44) the Circuit Court drew no distinction between actions arising on land and actions under the Jones Act, and, in fact, indicated that no distinction was to be made, as appears from the following sentence:

> Rec. p. 44: "The nature of the business and the particular dangers involved determine the amount of care required in any particular case, whether on land or on sea."

The petitioners further submit that the cases cited by the Circuit Court of Appeals, in the case at bar, as authority for the proposition that the standard to be applied to actions under the Jones Act is the same as that applied to land actions, fail to support and justify the conclusions set forth therein. The case of *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 377, cited by the said court on page 44 of the record, has been previously quoted herein, and the peti-

tioners submit that an examination of this case will clearly indicate that it stands as authority for the proposition that the same standard of care does not apply on land, as on sea, and that the master is required to exercise a high degree of care for the safety of seamen under his command. The next case cited by the said court (Rec. p. 45) is *Tiller* v. *Atlantic Coastline R. Co.*, 318 U.S. 54, which is an action by an employee of a railroad under the Federal Employers Liability Act, which in no way involves or even makes mention of seamen or their rights under the Jones Act. Next is the case of *Matson Navigation Co.* v. *Hansen*, 132 F.(2d) 487 (Rec. p. 45), which makes no mention of the standard of care under the Jones Act as compared with land actions. The case of *The Iroquois*, 194 U.S. 240, quoted by the court, (Rec. p. 45) arose prior to the enactment of the Jones Act and, therefore, has no reference to said act, but even in that case the court said:

> Page 247: "The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not."

The Circuit Court also cited the case of *Boston C.C. and N.Y. Canal Co.* v. *Seaboard Transportation Co.*, 270 F. 525, (Rec. p. 45) which involved cross libels in admiralty arising out of the stranding and sinking of a ship in the Cape Cod Canal. The claims were for damages to the ship and the canal locks and the rights of seamen were not involved, nor were the rights and liabilities arising out of the master and servant relationship under the maritime or common law involved or even discussed. The final case cited by the said court is *Wicher* v. *Phinney*, 124 F.(2d) 929, 933, (Rec. p. 45), which was an action under the New Hampshire Death Statute, arising out of an automobile accident, in which the issue before the court was the interpretation of the "Sudden

Emergency Doctrine'' under the New Hampshire law and the standard of care and definition of ''negligence'' under the Jones Act was neither involved or mentioned in any manner.

The petitioners respectfully submit that the course of reasoning and the decision adopted by the Circuit Court of Appeals, in the case at bar, in approving the trial court's action in refusing and failing to instruct the jury on the high degree of care owed to seamen under the Jones Act, being in conflict with the decisions of this Honorable Court and the Circuit Court of Appeals for the circuits hereinbefore mentioned, was such a departure from the accepted and usual course of judicial proceeding in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

II.

THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AS IT RELATES TO ASSUMPTION OF RISK IN SEAMEN'S ACTIONS UNDER THE JONES ACT, WAS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS HONORABLE COURT AND WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND, THIRD, AND SIXTH CIRCUITS AND WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN ACTIONS UNDER THE JONES ACT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

(a) *The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Sixth Circuits, substantiate the proposition advanced by the petitioners that assumption of risk is not available as a defense to actions under the Jones Act under any circumstances.*

In the recent case of *Jacobs* v. *City of New York* (1942), 315 U.S. 752, this Court speaking through Mr. Justice Murphy said:

Page 753: "Although proof of negligence is an essential to recovery under the Jones Act, (cases cited) contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies."

Also in the case of *Socony-Vacuum Oil Co., Inc.* v. *Smith* (1939), 305 U.S. 424, this Court through Mr. Justice Stone, made an exhaustive review of this defense, both under the admiralty law prior to the Jones Act and also under the Jones Act itself and concluded:

Page 431: "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

Other recent decisions of this Honorable Court holding that assumption of risk was not an available defense under the Jones Act are,

The Arizona v. *Anelich,* 298 U.S. 110.
Beadle v. *Spencer,* 298 U.S. 124.

Likewise the following excerpts of recent decisions, are illustrative of numerous decisions of the Circuit Courts that assumption of risk is not available as a defense to actions under the Jones Act, under any circumstances:

(1) ". . . The common law doctrine of assumption of risk (was) not a defense to a seaman's action for personal injuries." (*The S.S. Standard,* (1939 C.C.A. 2d) 103 F. (2d) 437, 438).

(2) "The rule of assumed risk or contributory negligence must be applied in admiralty under the doc-

trine of comparative negligence and neither is a bar to recovery but can be invoked only for the purpose of mitigating damages."

(*The Seeandbee,* (1939 C.C.A. 6th) 102 F. (2d) 577, 581).

(3) "Any thought of assumption of risk on the part of the plaintiff is not germane to the question of the ship owners' negligence in the maintenance of the unsafe condition. Assumption of risk is not even available as an affirmative defense to an action under the Jones Act. (cases cited) The peculiar circumstances attendant upon a seaman's discharge of his duties were the justification for the exclusion of assumption of risk as a defense under the Jones Act."

(*Armit* v. *Loveland,* (1940 C.C.A. 3rd) 115 F. (2d) 308, 311).

Other decisions of the Circuit Courts holding to the same effect, are:

American Pacific Whaling Co. v. *Kristensen,* 93 F. (2d) 17.

Cleveland-Cliffs Iron Co. v. *Martini,* 96 F. (2d) 632.

The New Berne Case, 80 F. (2d) 244.

(b) *The Circuit Court of Appeals in its decision, apparently adopted a particular feature of the concurring opinion of Mr. Justice Frankfurter in the case of Tiller v. Atlantic Coast Line R., Co., 318 U.S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court.*

To illustrate the apparent reliance of the Circuit Court of Appeals on the opinion of Mr. Justice Frankfurter, we submit the following paragraph from its opinion:

Rec. p. 49: "The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U.S. 54. But, as pointed out by Mr. Justice Frankfurter in his concurring opinion in the Tiller case, Congress 'has left undisturbed the other meaning of "assumption of risk", namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid, is not entitled to recover, since the employer was not negligent'."

The following excerpts illustrate the contrariety of opinions of Mr. Justice Frankfurter and of the majority of this Honorable Court in the Tiller case:

Opinion of Mr. Justice Frankfurter:

Page 72: " 'Assumption of risk' as a defense where there is negligence has been written out of the act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law."

Majority opinion delivered by Mr. Justice Black:

Page 58: "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

and also

> Page 67: "No case is to be withheld from a jury on any theory of assumption of risk . . ."

The recent case of *Pratt* v. *Louisiana & A. Ry. Co.*, (1943 C.C.A. 5th) 135 F. (2d) 693, interprets this defense in the Tiller case as follows:

> Page 693: "The defense of assumption of risk is not good; the only question is whether the carrier was negligent and, if so, whether that negligence was the proximate cause of Pratt's injury . . ."

(c) *The opinion of the Circuit Court of Appeals, in the case at bar, in sanctioning and approving the trial court's charge to the jury on assumption of risk, was such a departure from the recognized principles of law applicable to actions under the Jones Act, as to call for an exercise of this Court's power of supervision.*

To illustrate the action of the trial court, we quote from the opinion of the Circuit Court of Appeals referring to the case at bar:

> Rec. p. 47: "Counsel for plaintiff requested the court to give the following instruction as to assumption of risk:
>
> "If the jury finds that there were obvious dangers which the plaintiff's intestate could have observed and appreciated, yet continued with his work, he cannot be charged with having assumed the risk of such dangers while carrying out the orders of the master of the vessel."
>
> The instruction was not given, the court charging the jury on this point in part as follows:
>
> ". . . and the law says he assumed the obvious and well known risks of the business in which he is engaged."

"He assumes certain risks but those are the obvious and well known risks that are attendant upon that type of job."

"Then, when a man assumes the risks, obvious and well known risks attendant on the type of occupation he goes into he, of course, does not assume that any one is going to be negligent or any one is going to disregard the duties that are owed to him, but he assumes the other way that they are going to give him the reasonable protection to which he is entitled."

The petitioners submit that the instruction requested was a correct proposition of law, applicable to the case at bar, and the opinion and decision of the Circuit Court of Appeals in sanctioning and approving the trial court's action, was such a departure from the accepted and usual course of proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

CONCLUSION.

Your petitioners respectfully submit, therefore, that this Honorable Court should grant Certiorari in this case.

Respectfully submitted,

H. S. AVERY,
Attorney for Petitioners.

A. L. KAPLAN,
of Counsel.